

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT LAWRENCE BOMER, JR.,

Defendant-Appellant.

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UNPUBLISHED

March 31, 2000

No. 211359

Wayne Circuit Court

LC No. 97-004778

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC) involving the use of a weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), three counts of first-degree CSC involving personal injury to the victim, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), one count of kidnapping, MCL 750.349; MSA 28.581, two counts of assault with intent to commit CSC, MCL 750.520g(1); MSA 28.788(7)(1), and one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of twenty to forty years each for the first-degree CSC and kidnapping convictions, and five to ten years each for the assault convictions. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion in excusing the prosecution from producing defense witnesses Betty Beard and William Harrison for trial. Defendant asserts that the trial court erred in finding that the prosecution exercised due diligence in attempting to produce the witnesses.

Defendant emphasizes that at the due diligence hearing, the prosecutor incorrectly stated that the officer had four days to serve the witnesses, when she actually had eleven days.<sup>1</sup> Defendant contends that the trial court had ordered the prosecution to produce the witnesses on his behalf pursuant to MCL 775.15; MSA 28.1252, and therefore the prosecutor was obligated to show due diligence in attempting to do so. MCL 775.15; MSA 28.1252 provides in pertinent part:

If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena . . . .

Although defendant relies on *People v James (After Remand)*, 192 Mich App 568; 481 NW2d 715 (1992), *James* does not involve the production of a defense witness pursuant to MCL 77.15; MSA 28.1252. Rather, the issue in *James* concerned the admission of the preliminary examination testimony of a prosecution witness under MRE 804(b)(1) after the prosecutor failed to produce the witness at trial.

In any event, a showing of due diligence requires merely that the prosecution do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). Here, the officer-in-charge testified regarding her efforts to contact both witnesses by going to the addresses provided by defendant and calling the telephone numbers provided by the complainant. We conclude that the trial court did not abuse its discretion in finding that the prosecution exercised due diligence in attempting to produce the witnesses for trial.

## II

Next, defendant argues that his twenty-year minimum sentence for the CSC and kidnapping convictions is disproportionate in view of the fact that he was fifty-one years old at the time of sentencing. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant maintains that, pursuant to *People v Robinson*, 172 Mich App 650, 652-653; 432 NW2d 390 (1988), he may not be sentenced to a term that exceeds his life expectancy because that would be tantamount to sentencing him to a life term without the possibility of parole. However, *Robinson* was decided before the Supreme Court issued its opinions in *Milbourn, supra*, and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), which provide the standards for reviewing a sentence on appeal. *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997). There is no basis in *Milbourn* for a requirement that the trial court tailor every defendant's sentence in relationship to his age. *Lemons, supra* at 258. Under *Milbourn*, the key test is whether the sentence reflects the seriousness of the matter. *Lemons, supra* at 260. In the present case, defendant's sentences are

proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *id.*; *Milbourn*, *supra* at 636.

### III

Defendant has raised three additional issues in supplemental briefs. He first argues that he is entitled to a new trial because the trial court would not allow him to represent himself. The right to proceed in propria persona is explicitly secured under Michigan law by both the Michigan Constitution and statute. See Const 1963, art 1, §13; MCL 763.1; MSA 28.854. However, because self-representation necessarily entails waiver of the correlative Sixth Amendment right to counsel, a knowing and intelligent waiver of the right to counsel is an “essential prerequisite” to the right to proceed in propria persona. *People v Dennany*, 445 Mich 412, 427-428; 519 NW2d 128 (1994) (Griffin, J.); see *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976) (stating that a defendant does not have an absolute right to proceed to trial without counsel).

Before a criminal defendant may exercise his constitutional right to represent himself, he must make an unequivocal request to proceed without counsel. *People v Adkins*, 452 Mich 702, 722; 551 NW2d 108 (1996). Defendant asserts that the trial court’s refusal to allow him to represent himself “would appear to be evident” from either the December 4, 1997, or January 9, 1998, transcripts. Because defendant has not provided this Court with a copy of the transcript of the December 4, 1997, pretrial hearing, he has waived any claim of error with regard to that proceeding. See *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

The lower court file contains a number of handwritten documents prepared by defendant, which are either letters written to the trial judge or documents captioned as motions. In a handwritten letter dated November 21, 1997, defendant made a request to represent himself; however, at the bottom of the letter is the handwritten notation, “Withdrawn by deft,” accompanied by a date stamp of December 4, 1997. A handwritten document dated December 1, 1997, entitled “Motion for Court Order More Law Library Time,” petitions the trial court to issue an order giving him greater access to the law library at the Wayne County Jail so he can prepare to defend himself at trial. In a third handwritten document, also dated December 1, 1997, and titled “Motion for Additional Discovery,” defendant stated: “Mr. James Albulov will under no circumstances be representing me for anything in this case. The man is a li[a]r and I never want to see him again.”

At the January 9, 1998, hearing, defendant was represented by Albulov. There are no references in the transcript to defendant’s request to represent himself. During the hearing on January 15, 1998, the trial court mentioned various motions that defendant had filed, namely, a motion to dismiss because of the lack of a speedy trial, a motion to have his vehicle released, a motion to dismiss because defendant had been held for seventy-two hours, and a motion for a *Wade*<sup>2</sup> hearing, all of which were denied. The court did not refer to any motion regarding a request to proceed without counsel, and neither defendant nor defense counsel raised the issue.

On the record presented to this Court, defendant has not shown that he made an unequivocal request to represent himself, which was denied by the trial court. Therefore, defendant has not established any basis for relief with regard to this issue. See *Adkins, supra*.

#### IV

Defendant next argues that he is entitled to a new trial because he did not personally consent to the waiver of the production of a res gestae witness, namely, the doctor who first examined the complainant after the assault. We disagree.

Under the 1986 amendment to the res gestae witness statute, MCL 767.40a; MSA 28.980(1), the prosecutor no longer has the duty to use due diligence to produce any individual who might have any knowledge of the offense. The Legislature eliminated the prosecutor's burden to locate, endorse, and produce all res gestae witnesses. Instead, the prosecutor has the lesser duty of listing the names of known witnesses on the information and providing reasonable assistance in locating witnesses at the request of a defendant. *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995).

A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). In a sexual assault case, the physician who examined the victim is a res gestae witness. *People v Johnston*, 76 Mich App 332, 337; 256 NW2d 782 (1977). However, a defendant's personal consent to the waiver of production of endorsed witnesses is not necessary when the defendant is represented by counsel. *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983); *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976). Thus, defendant cannot claim error because trial counsel waived the production of the examining physician and stipulated to the introduction of the hospital record itself. Cf. *Johnston, supra*.

#### V

Finally, defendant maintains that defense counsel's failure to obtain a personal waiver from him was ineffective assistance of counsel. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Because there was no evidentiary hearing on this issue in the trial court, this Court's review is limited to mistakes apparent on the record. See *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). We find no indication in the record that the performance of counsel was below an objective standard of reasonableness under prevailing professional norms. See *Pickens, supra*. The waiver of production of a res gestae witness is a trial tactic within the province of defense counsel,

*Johnston, supra* at 337, and this Court will not substitute its judgment for that of trial counsel in matters of trial strategy, *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Defendant also has not demonstrated that, but for defense counsel's decision, the result of the proceedings would have been different. See *Pickens, supra*. Although defendant speculates that the doctor would have testified that the complainant's injuries were not consistent with her testimony, he presents no evidence to support this conjecture.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Helene N. White

/s/ Michael J. Talbot

<sup>1</sup> At the due diligence hearing, the prosecutor asked the officer-in-charge whether she was present in court on January 16, 1998, when defense counsel indicated that he needed assistance in producing the witnesses for trial, and the officer replied that she was. The prosecutor subsequently commented that, because trial was scheduled to begin on January 20, the officer had only four days notice to serve the witnesses. The officer concurred with that statement. In actuality, defense counsel had asked for assistance on January 9, 1998. However, defense counsel did not correct this misstatement at the due diligence hearing and, in fact, relied on the January 16, 1998, date himself when cross-examining the officer.

<sup>2</sup> *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 LEd2d 1149 (1967).